OGC 67-2102

OGC Has Reviewed

7 November 1967

MEMORANDUM FOR: Director, [redacted] STATSPEC STATSPEC STATSPEC

SUBJECT: Distribution of [redacted] STATSPEC

1. You have requested our opinion regarding the risk of legal liability to the Agency or its employees if [redacted] STATSPEC should be given wider dissemination. STATSPEC STATSPEC

2. You state that [redacted] STATSPEC distribution has been restricted to within Government, except for organizations and individuals engaged in Government business. You also advise that [redacted] STATSPEC which is understood to be a somewhat expurgated version [redacted] that is made available to the academic community, libraries, research organizations, press, members of Congress and embassies, but its limited utility has generated persistent requests [redacted] It is suggested broader dissemination of the publication or a restructuring [redacted] STATSPEC might be highly useful to academic and other groups having no direct connection with the Government because of studies that might result and good will engendered. In this connection, you state that despite the potential problems of copyright infringement and defamation [redacted] STATSPEC might be willing to increase public accessibility if this would not produce unacceptable risks for the Agency or its employees. You also request to be advised of what extent the [redacted] which in large part is merely a reproduction of information obtained from overt sources, can be withheld in view of the provisions of the Public Information Act of 1966 (P. L. 89-487).

3. In our prior advices on this general problem, we have noted the risk of involvement for both the producers and the users of intercepted material because of possible infringement of copyright and violation of private rights. To the extent that press agency transmissions are limited publications of intellectual productions, their appropriation without permission could constitute a violation of private rights for which our courts might give redress. We have pointed out that these rights subsist independent of statutory copyright. Although news of current events may be regarded as common property, it has been suggested news articles even though not copyrighted can be the subject of literary property at common law. International News Company v. Associated Press, 248 U. S. 215, 63 L. Ed. 211 (1918). In addition, we have also noted the potential liability of Agency employees as republishers of defamatory material. There have been several developments in the law, however, which lead us to conclude that in certain respects these risks no longer exist as regards suits brought before courts in the United States.

4. Infringements of statutory copyright done by or on behalf of the United States are now governed by statute. 28 U.S.C. 1498(b). By an amendment to the United States Code, whenever a copyright protected under the laws of the United States is infringed by the United States or by any person or contractor acting for the Government and with its authorization or consent, the owner's exclusive remedy is by suit against the United States in the Court of Claims. This amendment also provides for the compromise settlement of any claim which the copyright owner may have against the Government by reason of infringement. Specifically excluded, however, are claims for infringement arising in foreign countries.

5. The legislative history of the amendment shows that its purpose is to waive the sovereign immunity of the United States against suit for copyright infringement. It is intended to protect Government employees, acting within the scope of their employment. In addition, it affords a right of recovery for copyright infringement by contractors where such infringements are made with the consent and authorization of the Government. In those cases where the amendment applies, the remedy provided is exclusive. This means that neither civil nor criminal process may be issued against the employee or the contractor.

6. The United States as sovereign cannot be sued without its consent, and it may be sued only in those instances where its consent has been expressly given. The failure of the amendment to treat infringements of common law property rights in unpublished works exposes the Government employee to potential liability even though such infringements were done for the benefit of the Government. This situation obtains because the immunity of the United States is not available to the Government employee who invades the private rights of others, even on behalf of the Government. As stated by the Supreme Court:

> But the exemption of the United States from judicial process does not protect their officers and agents, ... from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States.... Belknap v. Schild, 161 U.S. 10, L. Ed. 599 (1896).

STATSPEC Notwithstanding the authority for this pronouncement, we can only observe, [redacted] has been infringing common law property rights for the past twenty years, the owner's disinclination to challenge affords a reasonable basis for assuming that the risk of liability is inconsequential.

7. The second development in the law concerns decisions of the Supreme Court on the question of the immunity of Government employees from suit for defamatory statements made in the performance of duty. As interpreted by the Court, this immunity is absolute. Barr v. Matteo, 360 U.S. 564, 3 L. Ed. 2d 1434 (1959) and Howard v. Lyons, 360 U.S. 593, 3 L. Ed. 2d 1454 (1959).

8. The defense of immunity rests on the idea that conduct which would otherwise be actionable is to escape liability because the defendant is acting on the furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. The interest thus favored may be one of the defendant himself, of a third person, or of the general public. If it is one of paramount importance, considerations of policy require that the defendant's immunity for defamatory statements be

absolute without regard to his purpose or motive, or the reasonableness of his conduct. If it has relatively less weight from the social point of view, the immunity may be qualified and conditioned upon good motives and reasonable behavior. Prosser on Torts, 3d Edition, page 796.

9. In Barr, the Court held that the Acting Director of the Office of Rent Stabilization was absolutely privileged to issue a defamatory press release in which he announced his intention to suspend two subordinates because of their participation in formulating a plan for the expenditure of funds that had been criticized in Congress and the press. A majority of the Court could not agree on a single opinion, one justice being of the view the Acting Director had not acted within the scope of his duties.

10. In the Howard case the majority held that a Navy captain, who was the commanding officer of a shipyard, was absolutely privileged to send a derogatory letter about officers of a labor organization to the Navy Department, with copies to a congressional delegation, explaining his reasons for having withdrawn recognition from the organization. The majority found that in making copies available to the congressional delegation, the petitioner was acting in the discharge of his official duties and hence was absolutely privileged.

11. The doctrine of absolute privilege to speak or write in a defamatory manner of any person had long been recognized to reside in federal officers of cabinet rank. Spalding v. Vilas, 161 U.S. 483, 40 L.Ed. 780 (1896). The significance of the Barr and Howard cases is that for the first time the Supreme Court found it necessary to consider whether this doctrine should be extended to officers in the lower ranks of the executive hierarchy. In Barr, the Court said:

> We do not think that the principle announced in Vilas can properly be restricted to executive officers of cabinet rank, and in fact it has never been so restricted by the lower federal courts (citing cases). The privilege is not a badge or emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government.... It is not the title of his office but the duties with which the

particular officer sought to be made to respond in damages is entrusted--the relation of the act complained of to "matters committed by law to his control or supervision,"....--which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

The Supreme Court itself has summarized the Barr and Howard rulings to be "federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill-will." Garrison v. Louisiana, 379 U.S. 64, 13 L.Ed. 2d 125 (1964).

12. It is against this background that the risk of liability of employees to suits for defamation incident to the dissemination of STATSPEC reports must be evaluated. At the outset we can dismiss from consideration all question of Agency liability. The Government has expressly refused to submit to suits for libel and slander. 28 U.S.C. 1346(b), 2680(h).

13. Under the provisions of the National Security Act, the Agency is charged with the responsibility for performing such [illegible] of common concern as the National Security Council may direct. 50 U.S.C. 403(d)(4). By National Security Council Intelligence Directive No. 2, the Agency is obliged to monitor foreign press broadcasts and disseminate the intelligence information among the several departments and agencies. To the extent that such information may contain defamatory material, there can be no question but that its employees would be absolutely privileged, it being self-evident that in making the information available they would be acting in discharge of an official duty.

14. We do not think that the dissemination of [redacted] reports STATSPEC to persons or groups outside of Government would defeat the employee's defense of absolute privilege. In our opinion, the absence of a direct connection between the recipient and the Government would not be critical. What is determinative are the conditions under which the publications are made. Publications made in discharge of official duties are absolutely privileged. Howard, supra. It is not a prerequisite to the privilege, however, that publication be required by law. In Barr, the Court stated: "The fact that the action here taken

was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable...." (Emphasis added.) As [illegible] federal court noted:

> In gauging privilege within this perimeter, the Supreme Court expressly rejected a rigid scope of duty, as literally prescribed by rule or regulation, in favor of a more generalized concept of line of duty.... Thus, statements which are neither strictly authorized by, nor in furtherance of, some rule or regulation may nevertheless be in line of official duty, hence privileged, if they are deemed appropriate to the exercise of the utterer's office or station. Prebble v. Johnson, 275 F. 2d 275 (1960).

15. In the decisions holding defamatory statements of Government employees to be absolutely privileged, certain common determinators can be found. These are:

a. The defendant's conduct was within the normal scope of his agency's powers.

b. The defendant's activity was prima facie in accordance with his duties and customary behavior.

c. Free exercise of the governmental function was considered to be highly important. Kelley v. Dunne, 344 F. 2d 129 (1965).

[illegible] opinion, the publication activity proposed would have these [illegible]ics. To the extent that some may be less obvious than others, the fact remains that on principle an employee cannot be challenged for actions taken pursuant to orders. It has been stated:

> A subordinate or ministerial official--i.e., one who acts under the orders of a superior official--is absolutely exempt from liability if the harm done by him is done solely in implicit obedience to an order lawful upon its face. Wigmore on Evidence (McNaughton, Revision 1961), Vol. 8 §2368.

16. We evaluate the risks of legal involvement due to the dissemination of reports containing press intercepts to be as follows:

a. Agency could be held liable for copyright infringement but its employees could not. We would suppose that as the area of dissemination is broadened, risk to the Agency would increase as in a geometric progression.

b. Employee could be held liable for infringement of common law property rights but that risk is insignificant.

c. Agency could not be held liable for defamation.

d. Employee would not be held liable for defamation.

17. We hasten to emphasize that despite the defenses available, publication of pirated material can always become a source of embarrassment. Accordingly, we urge that your present policy of instructing recipients treat [redacted] with circumspection not modified by any of the views expressed here. It should be noted we have not undertaken to assess the risk of liability that non-Government recipients themselves may have as republishers.

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18. The Public Information Act of 1966 emphasizes the citizen's right to know. In doing so, however, it recognizes limitations as regards national defense and foreign policy matters. It also recognizes the existence of statutes prohibiting disclosures in certain instances. Although the Reports may be mere reproductions of overt material, it does not follow they must be made generally available. We would suppose there would be adequate justification for refusing access if such action should be considered necessary to safeguard the monitoring effort. We refer to the statutory responsibility of the Director to protect intelligence sources and methods from unauthorized disclosure. 50 U.S.C. 403g. If this should not be a consideration, we see no legal basis for denying certain segments of the public access to the Reports while at the same time making them available to others, i.e., academic groups. It seems to us that

this type of selective dissemination could not be reconciled with the purposes of the Act. All this is not to say, however, that [illegible] must make its product available without charge. Agencies are encouraged to charge parties reasonable fees for making publications available. 5 U.S.C. 140. Then again, if the demand should prove burdensome, STATSPEC might wish to consider the possibility of having the printing and sale handled by the Government Printing Office.

STATINTL

[redacted]
Assistant General Counsel

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OGC [redacted]:mej
Distribution:
Original & 1 - Addressee
1 - Subject
1 - Signer
1 - Chrono